

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

**POLICE DEPARTMENT OF THE
CITY OF OMAHA**

and

**OMAHA POLICE UNION, LOCAL UNION 101
AFL-CIO - I.U.P.A.**

FMCS Case No. 12-00388-A

Grievant: J. Dolinsky

Arbitrator: Sharon K. Imes

APPEARANCES:

Bernard J. in den Bosch, Assistant City Attorney, appearing on behalf of the Police Department of the City of Omaha, Nebraska.

Dowd Howard and Corrigan, LLC by Michael P. Dowd, Attorney, appearing on behalf of the Omaha Police Union, Local Union 101, AFL-CIO - I.U.P.A. and the Grievant.

JURISDICTION:

The Police Department of the City of Omaha, Nebraska, referred to herein as the Employer, and Local Union 101, referred to herein as the Union, are parties to a collective bargaining agreement effective December 14, 2008 until December 21, 2013 and thereafter for successive one (1) calendar year periods unless one of the parties provides notice of the desire to modify the agreement as provided for in Article 47 of the agreement. Under this agreement, the undersigned was selected from a Federal Mediation and Conciliation Service panel to decide two disputes that have occurred between them. Prior to hearing scheduled for May 21, 22 and 23, the parties asked the Arbitrator to review a stipulation agreed to by them which reflects evidence that would have been submitted to the Arbitrator during the hearing regarding one of the two cases and to determine whether there is sufficient evidence to establish just cause to terminate that Grievant. The stipulation and exhibits attached to it have been received, the last of which was received May 24, 2012, and following is that determination.

STATEMENT OF THE ISSUE:

Is there just cause to terminate the grievant based upon the presented stipulation? If not, the matter should be returned to the parties for consideration.

RELEVANT CONTRACT LANGUAGE:

**ARTICLE 2
MANAGEMENT RIGHTS**

Except where limited by express provisions elsewhere in this Agreement, nothing in this Agreement shall be construed to restrict, limit, or impair the rights, powers, and the authority of the CITY as granted to it under the laws of the State of Nebraska, the Home Rule Charter of the City of Omaha, 1956, and CITY's ordinances. These rights, powers, and authority include, but are not limited to the following:

5. The right to hire, examine, classify, promote, train, transfer, assign, and retain employees; suspend, demote, discharge, or take other disciplinary action against employees for just cause; to relieve employees from duties due to lack of work or funds.

**ARTICLE 6
DISCHARGE AND DISCIPLINE**

SECTION 1 **DISCIPLINARY ACTION - CAUSE:** Any action which reflects discredit upon the service or is a direct hindrance to the effective performance of the CITY government functions shall be considered good cause for disciplinary action. The following are declared to be good cause for disciplinary action against any employee, though charges may be based upon causes and complaints other than those listed:

(i) Commission of acts or omissions unbecoming an incumbent of the particular office or position held, which render his admonishment, reprimand, suspension, demotion, or discharge necessary or desirable for the economical or efficient conduct of business of the CITY or for the best interest of the CITY government.

SECTION 5 **DISCIPLINARY ACTIONS - DISCHARGE:** An employee may be discharged for cause. Prior to the discharge becoming effective a written statement containing the reasons for the discharge shall be transmitted to the employee and to the Human Resources Department for inclusion in the employee's personnel file. The CITY may suspend such employee immediately and indefinitely with pay. Prior to the discharge becoming effective such employee shall be entitled to present his side of the facts surrounding the discharge to an impartial CITY decision maker.

ARTICLE 7
APPEAL PROCEDURE

SECTION 1

Any employee who has satisfactorily completed twelve (12) months of employment with the CITY shall have the right to appeal to either the Personnel Board or arbitration, but not both, from a suspension, termination of employment, or reduction in classification of pay not later than ten (10) working days after receiving notice of such action. There shall be no right of appeal from the Personnel Board to the arbitrator or from the arbitrator to the Personnel Board.

SECTION 5

If an election is made to appeal to arbitration, the procedure for selection of the arbitrator shall be as set forth in Article 8, Step 3, second paragraph, of this Agreement.

ARTICLE 8
GRIEVANCE PROCEDURE

SECTION 1

"Grievance" as defined in this agreement is a claim of an employee arising during the term of this Agreement which is limited to matters of interpretation or application of the express provisions of this Agreement and excluding discharge and disciplinary actions as provided in Article 6 hereof, which actions shall be processed in accordance with Appeal Procedure as set forth in Article 7 of this Agreement. The UNION shall have the right to file a grievance in accordance with Article 8.

SECTION 2

The following procedure shall be used in the submission of a grievance, as defined in Section 1 hereof.

Step 3.

The arbitration proceeding shall be conducted by an arbitrator to be mutually selected by the parties If the parties are unable to mutually agree as to the selection of an arbitrator within such time limit and either party continues to demand arbitration, the parties shall jointly request the Federal Mediation and Conciliation Service (FMCS) to provide a list of five (5) arbitrators. Each party shall have the right to strike two (2) names from the list of arbitrators submitted.

There shall be no appeal from the arbitrator's decision. It shall be final and binding on the UNION, if the UNION is a party to the arbitration, the CITY, and on all bargaining unit employees who take part in or are represented in the arbitration proceeding. Where an employee elects to process a grievance without UNION representation or assistance, the UNION shall have the right after the arbitrator has been selected to intervene and become a party to the proceeding.

Authority of the arbitrator is defined and limited by Article 7 and Article 8 of this Agreement. In the event the arbitrator finds that he has no authority or power to rule in the case, the matter shall be referred back (sic) to the parties without decision or recommendation on the merits of the case. The arbitrator shall be requested by the parties to issue his decision within thirty (30) calendar days after the conclusion of the hearing.

ARTICLE 18a
EMPLOYEES' BILL OF RIGHTS

All employees within the Bargaining Unit shall be entitled to the protection of what shall hereafter be termed as the "Police Officers' Bill of Rights" which shall be added to the present Rules and Regulations of the Omaha Police Department. The Rights and procedures contained herein shall not apply to any criminal investigations.

I. Unless agreed to by the employee, the CITY shall not divulge the reason for any disciplinary action that is not appealed beyond the Human Resources Director. The CITY shall make every reasonable effort to insure that no employee's home address, home telephone number or photograph of the employee which the CITY may possess, is released to the news media, or for public consumption. Should it be determined that this information was released, this, in and of itself, shall not be reason for change, in any fashion, of the disciplinary action that was imposed.

FACTS:

The parties submitted a joint stipulation which summarizes the evidence which will be submitted to the Arbitrator should this matter proceed to arbitration. It is detailed as follows:

1. On May 29, 2011, Jamie/Jimmy Levering, a high-ranking 29th Street Bloods gang member with a reputation for extreme violence and a self-proclaimed king of North Omaha who at one time efforts were made to pay him to move out of the City to calm violence in North Omaha, was killed at Club Seville, a club located in North Omaha.
2. Bruce Ferrell, a police officer with the City of Omaha between 1985 and January 1, 2008, when he retired, currently works as a part-time police officer for the City of Valley, Nebraska and has been President of the Nebraska chapter for the Midwest Gang Investigations Association since October 2007. He also has been President of the National Alliance of Gang Investigators Association, an organization that has twenty-two (22) state regional gang investigators associations, since 2009. He would testify as follows:

- He became involved with gangs while employed with the City of Omaha when, in approximately 1988, street gangs began coming to Omaha from Los Angeles to sell crack cocaine. In response, the City formed a Youth Violence Intervention Unit and assigned four officers, including Ferrell, to it. He also worked in narcotics and with the homicide unit where a number of his cases involved work with street-gang felony assaults and homicides.
- In 1999, he went back to work in the gang unit and continued working there until his retirement in 2008.
- His current affiliations with local regional gang associations puts him in contact on a regular basis with law enforcement agencies in the State of Nebraska and the Nebraska Attorney General's office performing training, legal updates and sharing information involving street gangs.
- Gang presence in Omaha has grown to approximately 4,000 street gang members with 75 to 90 different sets and the last two officers killed in the line of duty were directly connected to gang activity.
- Gang culture is a lifestyle based on violence and gang members are indoctrinated into a gang by being jumped by fellow gang members who attack the initiate and beat him until the designated time is up. The gang culture's code of conduct for its members reprimands, disciplines, and encourages retaliation for acts of disrespect to the gang. If a gang member is shot or shot at, fellow gang members are required to retaliate whether that is the public, rival street gang members or law enforcement.
- Gang members who have been shot in North Omaha are transported to one of two trauma centers, Creighton University Hospital or the University of Nebraska Medical Center. Creighton

University Hospital is located adjacent to the high crime area of North Omaha.

- North Omaha has a high crime rate with numerous shootings which ultimately culminated in the placement of a spot-shooter system to help triangulate the location of gunshots as an assist to the police.
- When a gang-related shooting occurs, large groups of fellow gang members, friends and family come to the hospital. Those who do come pose a threat to the victim, the general public and law enforcement in that many times rival gang members will attempt to access the emergency room, as well as the main floors of the hospital, and begin to walk the areas in an effort to find earlier victims to silence them or to find and intimidate witnesses. On occasion, it has been necessary to lock the emergency room doors in order to prevent access to the emergency room and to stop violence from erupting within the hospital setting.
- Creighton University Hospital does not have a metal detector and law enforcement officers have no way of knowing whether fellow gang members, family, or friends at the hospital following a gang-related shooting are carrying firearms or other weapons.
- Those who come to the hospital following a gang-related shooting are usually agitated and angry and become more agitated and angry over time especially if there is information that law enforcement was involved in the shooting. Further, under the gang culture and code, a gang member who believes that a fellow member was shot by a police officer is required to retaliate by either assaulting the officer or attempting to take the officer's life.

- Jamie Levering, a member of the 29th Street Bloods since approximately 2004, was responsible for at least three (3) homicides, multiple shootings, and was shot on a number of occasions by members of the 48th Avenue and Hill Top Gangster Crypts. He was indicted on several occasions; served at least one term in a federal penitentiary for firearms violations, and had been arrested and placed in the Douglas County Correctional System correctional center involved in assaults and rival gang members.
- Because Jamie Levering was brought into Creighton University Hospital with information being disseminated that he had been shot by a police officer, police officers needed to be hyper-vigilant in order to provide for their safety and to be aware of whether an individual within that setting was further inciting the crowd in order to remove them as quickly as possible from the scene.

3. On the evening of May 29, 2011, there were three separate officer-in-need calls transmitted throughout the City of Omaha causing officers to be thinly spread out. Officer Dollnsky was called back to work that evening to respond to the Creighton University Hospital officer-in-need call and became aware that Jamie Levering had been shot and killed and was at the hospital. She would testify that she was aware of the dangerous nature of her response based upon the factors cited by Bruce Ferrell.
4. The Creighton University Hospital emergency room and waiting area were filled with a crowd of thirty (30) to fifty (50) representing fellow gang members, family, friends and interested parties drawn to the hospital due to Levering's shooting.

5. Officer Dolinsky would testify that she recognized multiple 29th Street Blood gang members in the crowd and that the state of mind of those in the crowd was one of agitation and anger.
6. Multiple officers there witnessed the crowd making statements such as "fuck the police" and "cop-killers" and threats of "kill the police".
7. Officers in the hospital's emergency room area observed Robert Wagner, a large individual standing 6'4" and weighing 320 pounds who had identified himself as a family member to Jamie Levering, pacing back and forth and eyeing the officers and their service weapons. He became further agitated when a community activist and City Councilman, Ben Gray, came into the emergency room to address the family and called Gray "Uncle Tom" and said to him "fuck you, Ben Gray".
8. Officer Dolinsky would testify that she observed Wagner walking within the hospital lobby with his left hand in his waist band and considered that he might be carrying a weapon.
9. She would also testify that she was unsure as to whether Wagner was carrying a weapon until the time that he was handcuffed and detained.
10. Billy Jo Ceglar, a plain clothes detective, would testify that she directed Wagner to calm down and lower his voice between eight and ten times but that he never complied. She would also testify that since Wagner was further inciting the crowd following the arrival of Ben Gray he was directed to leave the hospital.
11. Officer Dolinsky would testify that she believed directing Wagner to leave the hospital rather than trying to effectuate his arrest within the hospital was the safest means of controlling the hostile environment.
12. Wagner walked out of the Emergency Room lobby followed by other officers, including Officer Scott Zymball. After starting to walk away from the building, he stopped, turned around, and walked back toward the emergency room.

13. Officer Ceglar would testify that as Wagner turned around and started walking back toward the hospital he started yelling further profanities and said something about killing the police at which time she directed he be arrested.
14. Officer Zymbali would testify that he approached Wagner; advised him that he was under arrest, and went hands-on with Wagner grabbing his left wrist. At that time, Wagner ripped his left arm away from Zymbali advising him to "get the fuck off me" and then threw a punch with his right hand striking the officer in the head.
15. After Wagner struck Officer Zymbali other officers came to his assistance and attempted to control and arrest Wagner.
16. Grievant's Use-of-Force Expert, Jon Edwards, would testify that Wagner was never under control during the period of time which Officer Dolinsky was alleged to have engaged in excessive force.
17. Officer Josh Kelly would testify that he struck Wagner two to three times with a baton in the peroneal nerve area and it "didn't even seem to faze him at all".
18. Other efforts to control Wagner included two (2) taser strikes, one of which was administered by Officer Dolinsky and the other by Officer Jodi Sautter, but neither was effective in controlling him.
19. After deploying the taser, the crowd in the hospital rushed the doors and two State Patrol Officers had to hold the doors shut to prevent the crowd from overtaking the arresting officers. The crowd was banging on the window so hard that Officer Ruben Soto would testify "I thought for sure that the glass was going to break."
20. Officer Dolinsky would testify that at the time she was unsure whether Wagner was under the influence of PCP which would allow him to fight through the effects of a taser strike and vest him with abnormal strength.

21. When Wagner was being brought to the ground he reached forward around Officer Aaron Pennington's gun belt and Officer Pennington will testify that he felt his gun belt being pulled by Wagner's left arm and hand.
22. An aggressive act of grabbing an officer's gun belt and firearm could allow for the officer, under the Force Continuum, to use deadly force at that time.
23. Officer Dolinsky would testify that she was kicked by Wagner in the left leg as she continued to hold her taser in her right hand.
24. She would also testify that she had a knife in her left pant pocket and when Wagner reached toward her left pocket she believed he was reaching for that weapon; stepped back, and engaged in a set of three kicks which she intended to strike the peroneal nerve area of his leg.
25. Kicking the peroneal nerve area of the leg is a technique taught and approved by the Omaha Police Department as a distraction technique and one meant to cause a loss of motor function which causes the suspect to become compliant to officer commands.
26. While attempting to bring Wagner under control, police officers were shouting commands for him to put his hands behind his back and to quit resisting. Nonetheless, he was non-compliant.
27. Officer Christian Mirch would testify that Wagner's strength was so great that it took his entire body weight to eventually bring Wagner under control.
28. Officer Dolinsky is 5'4" tall and weighs 128 pounds.
29. Officer Dolinsky would testify that her actions when Wagner attempted to reach toward her left pocket were consistent with the "closest weapon/ closet target" principle she was taught and that the option of disconnecting the probes from her taser unit; re-holstering the weapon, and then attempting to grab Wagner's arm given his size and demonstrated strength was not a reasonable approach under the circumstances at that time.
30. Officer Jason Stracke is the Internal Affairs Investigator for the Omaha Police Department and was charged with investigating Officer Dolinsky's conduct.

He completed his investigation and submitted his executive summary in mid-August.

31. Article 18a, Subsec. I of the parties' collective bargaining agreement provides that unless the employee agrees, "the City shall not divulge the reasons for any disciplinary actions that have not been appealed beyond the Human Resources Director."
32. On Tuesday, August 30, 2011, a portion of the surveillance video showing the scene was made public without the consent of either Officer Dolinsky or Officer Pennington. It is unknown how and by whom the video was released for public viewing.
33. When Officer Stracke returned to work on September 1, 2011 the surveillance video had been released and he was directed to reopen the investigation and to consult with the Department's defensive tactics training instructor, now identified as the City's Use of Force Expert, Officer Jon Edwards. During the interview with Officer Edwards, conducted during the morning of September 2, 2011, Officer Edwards was asked for his opinion regarding Officer Pennington's conduct and he commented upon Pennington's actions after reviewing the videotape. During this interview no questions were asked about Officer Dolinsky's conduct.
34. On that same day, during the afternoon, Officer Stracke contacted Officer Edwards by telephone and provided him with hypotheticals concerning Dolinsky's conduct but did not review the video with him.
35. Lieutenant Rowland would testify that prior to the video's release he prepared a summary of the Internal Affairs Investigation and submitted the Internal Affairs file to the Chief of Police. He would also testified that he edited his summary after receiving additional information and provided the final summary to Officer Dolinsky's counsel and that the Chief of Police directed him to issue the discipline on September 2, 2011 during the time when the Department was feeling the public outrage.

36. Officer Stracke would testify that this is the first time in the two hundred to two hundred fifty cases he has investigated discipline was imposed before the investigation was completed.
37. He would also testify that having conducted the investigation on this matter, the only witness to where Officer Dolinsky's leg strikes landed was Officer Jodi Sautter who said they were to the peroneal nerve area and that Officer Sautter was not disciplined for false reporting. He would testify, further, that the location where Officer Dolinsky's second and third kick struck Robert Wagner was obstructed on the video.
38. Officer Stracke would also testify that if the excessive use of force charge fails for lack of conclusive evidence the charge for conduct unbecoming an officer would be retracted and that the charge relating to incomplete reporting is based upon the initial review of the video and the debate over the location where the Officer's strikes landed.
39. Robert Wagner was not injured.
40. The City's Use of Force Expert, Jon Edwards, would testify that an officer's use of defensive tactics and application of the force continuum must be measured based upon the totality of the circumstances facing the officer and that assuming the accuracy of the facts set forth above, Officer Dolinsky would not have engaged in excessive use of force.
41. The Officer's Use of Force Expert, Steve James, would testify that he has reviewed the Internal Affairs file, the video footage in question and the Officer's analysis of the video and is of the opinion that the Officer did not engage in excessive use of force.
42. The Omaha Police Chief would testify that based upon his review of the video the second and third kicks made by Officer Dolinsky clearly did not strike the peroneal nerve but were directed instead at the chest and side of Robert Wagner, a clear violation of the City's Standard Operating Procedure

for Use of Force. He would also testify that based upon his conclusion, Officer Dolinsky's Chief Report is inaccurate.

In addition to the stipulated facts, a number of documents were submitted to the Arbitrator for review and the following facts are ascertained from those documents.

1. Officer Dolinsky's Chief's Report details that she deployed a taser during the encounter with Robert Wagner which struck him in the chest area; that when he continued to fight and grab for officers' legs she drove stunned him on his back while delivering leg strikes to his common peroneal area all the while loudly commanding Wagner to stop resisting.
2. In this report Officer Dolinsky's Supervisor found "no violations" and the Captain stated that her use of force "was reasonable" and that "no further action (is) needed."
3. The surveillance video shows Officer Dolinsky striking at Robert Wagner with her foot three times. It does not show, however, whether the strikes were to the peroneal nerve area in Wagner's leg or to his chest and side area since a view of her actions is blocked by other officers attempting to bring Wagner under control.
4. On September 2, 2011, in a letter to the Grievant, the Chief of Police recommended Officer Dolinsky be terminated making the following findings:
 - The internal investigation which he authorized determined that the "leg strikes to the common peroneal area" which she had reported were not to the common peroneal area but to the chest and side of the male's torso; that the "leg strikes" were not within the Omaha Police Department Force Continuum policy, and that the report she prepared "did not accurately reflect" her actions.
 - Her use of force was "excessive and beyond that permitted by the Standard Operating Procedures."
 - Her Chief's Report "did not accurately reflect . . . (her) actions taken during the incident."

- Her conduct was found to "unbecoming an officer of the Omaha Police Department."
- The "allegations of violating the Omaha Police Department's Standard Operating Procedures in regards (sic) to the Use of Force -- Resistance and Control Continuum; Conduct Unbecoming an Officer or Employee; and Rule of Conduct - Failure to Make a Required Report or MakIng Improper or Incomplete Reports are sustalned."
- Her conduct violates S.O.P., Volume II, OPS F, Force - Resistance and Control Continuum; S.O.P., Volume I, Admin., Personnel, Rules of Conduct, Chapter 1 - Section 1, Conduct Unbecoming an Offlcer or Employee; S.O.P., Volume 1, Admin., Personnel, Rules of Conduct, Chapter 1 - Section 9, Failure to Make a Required Report or MakIng Improper or Incomplete Reports, and Article 6, Section 1 and Article 6, Section 1 (j) of the Collective Bargaining Agreement.

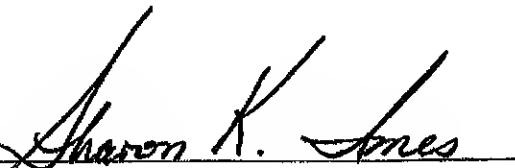
DISCUSSION:

The charges against the Grievant include excessive use of force; conduct unbecoming an officer, and failure to provide a complete report. The stipulation and evidence provided to the Arbitrator does not prove these allegations. While the Police Chief believes, based upon his review of the surveillance video, that the second and third kicks made by the Grievant were to Wagner's chest and side, the evlidence in the record does not support his belief. The only witness to the incident would testify that she observed the kicks landing in the peroneal nerve area and the surveillance tape does not prove otherwise since the location where the kicks landed is obstructed from view. Further, the City's use of force expert, the person more experienced in viewing such tapes and constructing the circumstances surrounding an incident, would testlfy that based upon the totality of the circumstances; the Grievant's statement and that of the witness to the incident, he would conclude that the Grievant did not use excessive force. The same conclusion would be testified to by the Grievant's Use of Force Expert. Their potential testimony, together with the eye witness' statement and that of the Grievant and the lack of proof provided by the surveillance video strongly supports a finding that the evidence is

not sufficient to establish just cause to terminate the Grievant for excessive use of force; for conduct unbecoming an officer and/or for failure to accurately complete the Chief's Report. Based upon these findings, it is concluded that the City of Omaha cannot sustain its burden to prove it has just cause to terminate the Grievant. Accordingly, the following determination is made:

DETERMINATION

This matter is remanded to the parties for further consideration. The Arbitrator, at the request of the parties, retains jurisdiction over this dispute in the event that further involvement is needed.

By: 

Sharon K. Imes, Arbitrator

May 30, 2012
SKI